

Principles of public law

Constitutionalism & the Australian Constitution

King and Executive is bound by law

Marbury v Madison (1803)

- Constitution limits the powers of the parliament
- Law > Kings
- Constitution supreme over the government, parliament, executive etc
- Courts will police the limits of parliament's power

Subordination of the executive to law

Entick v Carrington

- state secretary (minister) wanted to investigate for seditious liable (defamation, attempt to bring down the government), authorised searches etc
- Court: can the minister authorise people to go through my stuff, even if they may be seditious?
- Court: no, the minister is not above the law, cannot break into people's houses and search (only parliament can change the law)
- Executive warrant to search and seize papers to prove seditious libel held invalid

Australian Communist Party v Commonwealth (1951)

- Court struck down the laws passed by parliament (to ban the communist party & punish its supporters & confer power on the parliament)
- Court are going to reign in the executive if they pose a threat to democratic government
- A power to make laws with respect to lighthouses does not authorise the making of a law with respect to anything which is, in opinion of law-maker, a lighthouse.
- A power to make similar proclamation with respect to anything which in the opinion of the Governor-General is a lighthouse is another thing
- The courts will determine whether it's a lighthouse or not, the opinion of parliament/executive is not decisive

A v Hayden

- ASIS – overseas spy agency, decided to train staff by staging mock rescues
- ASIS Exercise at Sheraton Hotel in Melbourne – sledgehammer doors, firearms with blank ammunition etc

- Was there any authority for the foreign minister to authorise his agents to go around breaking the law
- Neither ASIS nor the minister nor the executive government could confer authority upon any of the plaintiffs to commit an offence or immunity from prosecution for an offence once committed
- The executive power of commonwealth must be exercised in accordance with the constitution and the laws of the commonwealth
- The executive government cannot dispense with the law
- Courts can ensure that the executive cannot exceed their authority under the constitution and laws
- The constitution is final

Parliamentary supremacy

- Parliament may make or repeal any statute it chooses
- S51 of the Constitution confines legislative powers of the Commonwealth

Federalism

- Cooperation, rather than conflict
 - i. Changes to firearms laws following mass killings at Port Arthur in Tasmania 1996
 - ii. Agreement on terrorism laws 2002
 - iii. Defamation laws 2004

Responsible government

- Not stated in Constitution Acts
- Elements (relationship between legislature & executive):
 - i. Ministers come from the majority party
 - ii. Must resign when confidence is lost
 - iii. Ministers are members of parliament
 - iv. Governor or governor-general acts on the advice of the ministers, but have reserve power
 - v. Assumes the effectiveness of political parties and party discipline within the parliament
 - vi. Elected lower and upper house

Separation of powers

- 3 branches of government are separated to avoid the over-concentration of power
- Emphasis on separation of the judiciary
- Doctrine of separation of judicial power implied in the constitution

Due process of law and natural justice

- Public officials must follow the law
- If subject to law, should be accorded due process of law
- Not included in the Commonwealth Constitution, recently rejected again
- Principles of natural justice
 - Entitlement of a person to fair hearing before decision made by a public official
 - Decision made not biased in a legal sense

Ultra vires

- Whether regulations or other forms of subordinate legislation are within the powers given by primary legislation
- Beyond the powers
- Whether official action is lawful or not

Judicial review

- The court may consider whether official action is lawful or not
- Doesn't touch on matters of fact. Ask a set of legal questions about the decision under review
- Whether the statute is in conformity with constitution
- Considers whether legislation is valid (based on the constitution), not the merits
- Can be politically controversial, but courts do not decide on political grounds (decision made on legal principles, grounds and precedents)

Rule of law

- Sovereignty or supremacy of law over man

John Locke

- 'freedom of men under government is to have a standing rule to live by, common to everyone of that society, and made by legislative power erected in it: ... and not to be subject to the inconstant, uncertain, unknown and arbitrary will of another man'

Separation of powers

Legislative power Chapter I

- S1 Australian Constitution The legislative power of commonwealth shall be vested in a Federal Parliament, which shall consist of the Queen, a senate and a House of Representatives
- S51 The parliament shall, subject to this Constitution, have power to make laws for the peace, order and good government of the Commonwealth
- S52 Exclusive power, has power to make laws

Executive power Chapter II

- S61 The executive power of the commonwealth is vested in the Queen and is exercisable by the Governor General as the Queen's representative, and extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth
- S62 'a federal Executive Council to advise the Governor-General in the government of the Commonwealth'
- S63 'The Governor-General in Council ...acting with the advice of the Federal Executive Council'
- S64 Governor-General appoint Ministers of State for the Commonwealth and members of the Federal Executive Council
- Executive other than ministers
 - Department – public servants
 - Agencies eg ASIC (Australia Security Investment Commission), ACCC (Australian Competition and Consumer Commission)

Express power of executive given by Constitution

- S5 appoint times for holding sessions of P, prorogue P, summon P
- S32 writs for General Elections (in Council)
- S68 Command in chief of the naval and military forces of the Commonwealth
- S72 appointment and removal of Chapter III judges (in council)

Implied

- Nationhood power = coercive power + the power to apportion expenditure

Victoria v Commonwealth (AAP)

- A spending scheme (to distribute funding) related to the establishment of regional community centre and activities
- Regional councils established with the intention to provide community welfare services do not fall under nationhood power

Pape v Commission of Taxation

- A uni professor unsuccessfully challenged the constitutionality of Tax Bonus for Working Australian Act 2009(Cth)
- Nationhood power supported a scheme for the payment of tax bonuses during a climate of global financial crisis
- Economic stimulus package during economic crisis

David v Commonwealth

- S22 of Australian Bicentennial Authority Act prohibits the combination of some words, such as 200year, 1788 etc. P in question offended this provision by orienting t-shirt with those words
- It was held that a body to celebrate the bicentenary fell within the nationhood power, but rejected legislation which imposed offences relating to the celebrations
- So nationhood power is limited as it only supports coercive legislation

Reserve powers

- Choice of PM: appointment (in hung P) and dismissal (after 'no confidence' motion)
- Lang Government (New South Wales) 1932
- Whitlam Government (Commonwealth) 1975
- Exercisable by GG without receiving advice
- Power to appoint and dismiss PM

Legislation

- Migration Act 1958 (Cth) issuing visas
- About delegated legislative power: not really the executive's power as the validity of the delegated rules and regulations still depend upon the parliamentary act which prescribes the criteria of validity
- Often limited by statutes and judicial review (partially entrenched in constitution)

Prerogative (common law) powers

- Prerogative power = shared between Cth and State
- Can only be limited by the enactment of legislation which states specifically
- Legislation will override any pre-existing prerogative power

Tampa case (Ruddock v Vadarlis)

- 433 asylum seekers were rescued by Tampa, but intercepted and not permitted to dock and were removed to HMAS Manoora
- Considered the actions of the federal executive in preventing 433 asylum seekers from entry
- The asylum seekers had to be dealt with under Migration Act 1958 (Cth)
- E's power to detain is punitive
- Judicial power therefore, has to be performed by judiciary. However, there are exceptions to this rule, and limited forms of 'executive detention' are permitted (eg immigration detention)

Attorney General v De Keyser's Royal Hotel Ltd

- During WWI, the government took over a hotel.
- According to Act, such action must be followed by reasonable compensation.
- After WWI, the government refused to pay on the ground that it exercised prerogative power instead of statutory power in taking over the hotel

- if and when there is a statutory power conferred on the executive, the general rule is that this will override any pre-existing prerogative power

Relationship between legislative and executive powers

- legislative act is the creation and promulgation (proclamation) of conduct without referencing to case
- executive power is the application of a general rule to a particular case with the requirements of policy or expediency or administrative practice
- executive carry out the law made by legislative power

Overlapping between legislature and executive (Doctrine of responsible government)

- government minister shall not hold the office for more than 3 months if he/she is not a member of the parliament (s64)
- Westminster system, government shall be accountable to the parliament at all time
- Party with majority seats in lower house shall form government, the leader of that party is often appointed as the PM and ministers are often chosen from the party to constitute cabinet
- Delegation of the power to make rules and regulations by parliament to the executive

Victorian Stevedoring v Dignan

- Delegation of legislative power (regulations)
- Parliament -> general schemes -> executive to draft up the laws

Judicial Power

Judicial power Chapter III

- S71 The judicial power of the Commonwealth shall be vested in a Federal Supreme Court, to be called the High Court of Australia, and in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction

Boilermakers case

2 limbs:

- Judicial power of the Commonwealth cannot be vested in any tribunal other than Chapter III Court
- A federal Chapter III Court cannot be invested with anything other than federal judicial power

Legislative usurpation of judicial power